

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DERRICK LANCASTER,

Defendant-Appellant.

UNPUBLISHED

November 18, 2004

No. 248612

Wayne Circuit Court

LC No. 03-001120-01

Before: Kelly, P.J., and Gage and Zahra, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of first-degree premeditated murder, MCL 750.316(1)(a), felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced, as a fourth habitual offender, MCL 769.12, to two years' imprisonment for the felony-firearm conviction, twenty to eighty years' imprisonment for the felon in possession of a firearm conviction, and life imprisonment for the first-degree murder conviction. We affirm.

On August 4, 2002, the victim was at Club 313 in Detroit with several of his friends. The victim and his friends became involved in a fight with some of defendant's friends, and everyone was removed from the club. The fight continued in the street, and the victim was shot several times and died of multiple gunshot wounds.

On appeal, defendant first claims that the trial court erred in permitting the prosecution to present rebuttal evidence, which effectively divided its case in chief between direct and rebuttal portions. To preserve a claim of erroneous admission of rebuttal evidence, a defendant must timely and specifically object to the rebuttal evidence. *People v Kelly*, 423 Mich 261, 281; 378 NW2d 365 (1985); *People v Rice (On Remand)*, 235 Mich App 429, 442; 597 NW2d 843 (1999). Because defendant failed to object to the rebuttal evidence presented by the prosecutor, we review this issue to determine whether the introduction of rebuttal evidence constituted plain error affecting defendant's substantial rights. *Rice, supra* at 442.

A prosecutor is not permitted to divide the evidence on which the people propose to rest the case between direct and rebuttal portions. *People v Griffin*, 235 Mich App 27, 38; 597 NW2d 176 (1999). A prosecutor may, however, present rebuttal evidence to "contradict, repel, explain or disprove evidence produced by the other party and tending directly to weaken or impeach the same." *People v Figgures*, 451 Mich 390, 399; 547 NW2d 673 (1996) (citations

omitted). Admission of rebuttal evidence is within the trial court's discretion. *Id.* at 398. As the Michigan Supreme Court stated:

[T]he test of whether rebuttal evidence was properly admitted is not whether the evidence could have been offered in the prosecutor's case in chief, but, rather, whether the evidence is properly responsive to evidence introduced or a theory developed by the defendant. As long as evidence is responsive to material presented by the defense, it is properly classified as rebuttal, even if it overlaps evidence admitted in the prosecutor's case in chief. [*Figures, supra* at 399 (citations omitted).]

Defendant presented an alibi defense, asserting that he was working as a disc jockey at a different nightclub when the victim was killed. In response to the alibi defense, the prosecutor presented a witness who testified that he saw defendant at Club 313 on the night in question. Although the testimony overlapped evidence presented in the prosecutor's case in chief, we conclude that the rebuttal testimony directly responded to alibi evidence introduced by defendant and defense witnesses and the position advanced by defendant in his direct defense. Therefore, we hold that the testimonial evidence at issue constituted proper rebuttal evidence and that the trial court did not err in permitting the prosecutor to present the rebuttal testimony.

Defendant also argues that the trial court erred in admitting alibi rebuttal evidence because the prosecutor failed to file an alibi rebuttal notice as mandated by MCL 768.20(2). Defendant, however, waived this claim for appeal by not objecting to the prosecutor's failure to file notice and by not objecting to the alibi rebuttal testimony at trial. *People v Chapman*, 165 Mich App 215, 217-218; 418 NW2d 658 (1987); *People v Hence*, 110 Mich App 154, 173-174; 312 NW2d 191 (1981).

We also hold that defendant failed to prove his related claim that defense counsel was ineffective for failing to object to the prosecutor's introduction of rebuttal testimony. Because the rebuttal testimony was properly introduced as directly responsive to defendant's alibi defense, defense counsel's objection would have been futile. Defense counsel is not required to make futile objections. *People v Milstead*, 250 Mich App 391, 401; 648 NW2d 648 (2002).

Defendant's second claim on appeal is that the trial court erred by permitting the prosecutor to introduce evidence of defendant's other bad acts, which included defendant's alleged involvement in a prior fight and shooting at the O.G. Lounge in Detroit. We review a trial court's decision to admit evidence for an abuse of discretion, and we review de novo preliminary questions of law involved in that decision. *People v McDaniel*, 469 Mich 409, 412; 670 NW2d 659 (2003). An abuse of discretion is found when an unprejudiced person, considering the evidence on which the trial court based its decision, would conclude that there was no justification or excuse for the ruling. *People v Gonzalez*, 256 Mich App 212, 217-218; 663 NW2d 499 (2003).

In this case, the prosecutor sought to introduce evidence of a prior fight and shooting at the O.G. Lounge and evidence that the same weapon was used at the O.G. Lounge shooting and the Club 313 shooting to prove defendant's identity as the shooter at Club 313. The trial court granted the prosecutor's pre-trial motion to introduce evidence that the same gun was used at both shootings to show defendant's identity pursuant to MRE 401 and *People v Hall*, 433 Mich

573; 447 NW2d 580 (1989), and to show defendant's plan or scheme and motive to establish defendant's identity as the shooter pursuant to MRE 404(b). In *Hall, supra* at 582-583, 586, the Michigan Supreme Court held that the defendant's possession of a sawed-off shotgun more than seven months after the armed robbery for which he was charged, although introducing an unrelated crime, was directly relevant and admissible to show that the defendant used a similar weapon to commit the charged crime. "Evidence of a defendant's possession of a weapon of the kind used in the offense with which he is charged is routinely determined by courts to be direct, relevant evidence of his commission of that offense." *Id.* at 580-581. The Court also concluded that MRE 404(b) did not preclude admission of the evidence because the evidence was direct and relevant to a material issue. *Id.* at 583.

As in *Hall, supra*, defendant's identity as the shooter at Club 313 was at issue in this case because the prosecutor was required to prove that defendant was the perpetrator of the crime and because defendant presented an alibi defense denying his presence at Club 313 at the time of the shooting. Ballistics evidence indicated that the casings and bullets from both crime scenes came from the same gun. Moreover, a witness' prior testimonial evidence indicated that defendant was the shooter at the O.G. Lounge incident. The evidence presented of defendant's prior possession and use of the same gun that was used at the Club 313 shooting was directly probative of defendant's guilt of the charged offense. Moreover, the trial court explained to the jury on three separate occasions that defendant was not on trial for the O.G. Lounge shooting and that the evidence of the prior shooting could only be used for limited purposes and not to show defendant's character or propensity to commit crime. Accordingly, we hold that the trial court did not err by admitting the evidence of defendant's prior bad acts pursuant to MRE 401 and *Hall, supra*, as directly relevant of defendant's identity as the shooter at Club 313. Because the evidence of defendant's other bad acts was admissible pursuant to MRE 401 and *Hall, supra*, as directly relevant to a matter of consequence, MRE 404(b) is not implicated. *People v Houston*, 261 Mich App 463, 468-469; 683 NW2d 192 (2004).

Defendant's third claim on appeal is that the prosecutor improperly questioned a witness regarding defendant's post-arrest silence and improperly commented on that testimony during closing and rebuttal arguments. To preserve claims of prosecutorial misconduct for review, a defendant must timely and specifically object. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003); *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002). Because defendant failed to object at trial to the prosecutor's conduct in presenting the evidence and commenting on the evidence that formed the basis of the alleged misconduct, we review his claim for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999); *Ackerman, supra* at 448. "To avoid forfeiture under the plain error rule, three requirements must be met (1) an error must have occurred; (2) the error was plain; (3) and the plain error affected substantial rights, i.e., the defendant was prejudiced (the defendant generally must show that the error affected the outcome of the lower court proceedings)." *People v Barber*, 255 Mich App 288, 296; 659 NW2d 674 (2003), citing *Carines, supra* at 763. A prosecutor's comments must be reviewed on a case-by-case basis by examining the record and evaluating the prosecutor's comments in context to determine if the defendant was denied a fair and impartial trial. *Rice, supra* at 434-435.

A prosecutor is not permitted to use custodial statements as evidence unless he shows that before questioning, the defendant was warned that he had a right to remain silent, that any

statements could be used against him, and that he had the right to counsel. *People v Harris*, 261 Mich App 44, 55; 680 NW2d 17 (2004). Due process prevents introduction of a defendant's post-arrest and post-*Miranda*¹ silence when a defendant has invoked the right to remain silent. *People v McReavy*, 436 Mich 197, 218; 462 NW2d 1 (1990). Moreover, if a defendant has been given his *Miranda* warnings and refused to say anything thereafter, testimony regarding his refusal to respond to questions is improper. *Rice, supra* at 436. Yet, this Court will not endorse a "formalistic view" of a defendant's silence when the defendant has not maintained his silence by choosing to speak. *McReavy, supra* at 218. "Thus, a description of a defendant's behavior which serves to explain the circumstances and conduct of a defendant who has not invoked his right to remain silent will not be considered improper comment on the 'defendant's postarrest silence.'" *Id.* at 217, quoting *United States v Shaw*, 701 F2d 367, 381 (CA 5, 1983). Likewise, when a defendant has chosen not to remain silent, a prosecutor may question and comment on the defendant's failure to assert a defense to the police. *People v Davis*, 191 Mich App 29, 34-36; 477 NW2d 438 (1991).

The record indicates that defendant was advised of his constitutional rights, including his right to remain silent, prior to interrogation. There is no evidence that defendant invoked his right to remain silent or refused to speak during the interrogation. Moreover, the record does not indicate that defendant's failure to respond when he should have asserted an alibi defense was due to defendant's reliance on his right to remain silent. Therefore, we conclude that the prosecutor's questions and comments about defendant's behavior, failure to properly respond, and failure to assert an alibi defense during interrogation were not improper because defendant did not invoke his right to remain silent and did not refuse to speak.

Defendant's final claim on appeal is that he was denied his right to a fair trial when the prosecutor improperly vouched for the credibility of witnesses and improperly asserted his belief in defendant's guilt. Because defendant failed to object to the prosecutor's statements that formed the basis of the alleged misconduct, we review this claim to determine if the prosecutorial misconduct constituted plain error affecting defendant's substantial rights. *Carines, supra* at 763; *Ackerman, supra* at 448. Reversal is warranted only when the plain error results in the conviction of an innocent defendant or substantially impairs the fairness, integrity, or reputation of the judicial process. *Carines, supra* at 763; *Ackerman, supra* at 448-449.

A prosecutor has the duty to provide a defendant with a fair trial. *People v Ullah*, 216 Mich App 669, 678; 550 NW2d 568 (1996). Prosecutorial vouching occurs when a prosecutor makes personal assurances of a witness' veracity or when a prosecutor claims to have personal information or "special knowledge" of which the jury is unaware, lending to the credibility of a witness. *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995) (discussing the prosecutor's reference to a plea agreement, which contained a promise of truthfulness). A prosecutor is, however, permitted to argue the evidence and all reasonable inferences drawn from the evidence. *Bahoda, supra* at 282; *Ackerman, supra* at 451, 453. A prosecutor's arguments must be read in context and reviewed in light of defense arguments and the evidence admitted at trial. *Ackerman, supra* at 452.

¹ *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; L Ed 2d 694 (1966).

After reviewing the record, we conclude that the prosecutor never expressed personal knowledge that the testimony of the prosecutorial witnesses was truthful or asserted that he had “special knowledge” of their credibility. *Bahoda, supra* at 276. The prosecutor emphasized that the consistency in testimonial evidence and physical evidence supported the prosecutorial witnesses’ version of the events. A prosecutor may argue from the evidence that a witness is worthy or not worthy of belief. *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996). Thus, the prosecutor’s comments concerning the consistency and logic of the prosecutorial witnesses’ testimony were proper. The prosecutor also implied that the victim’s friends who testified were credible because they had no motive to lie. The prosecutor argued that it would have been easier for the victim’s friends to identify as the shooter one of the other participants in the fight because they were seen by numerous witnesses. He also argued that the victim’s friends were only interested in seeing the true killer brought to justice. A prosecutor may argue from the facts the credibility of a witness when conflicting testimony exists and a defendant’s guilt or innocence rests on which version of the testimony the jury believes. *People v Flanagan*, 129 Mich App 786, 796; 342 NW2d 609 (1983). Therefore, the prosecutor’s comments concerning the prosecutorial witnesses’ lack of motive to lie were proper. The prosecutor’s remarks were also responsive to defense counsel’s closing argument that the only witnesses to identify defendant as the shooter or the person with a gun were the victim’s friends. Because a prosecutor’s remarks are to be viewed in context and in light of defendant’s arguments and position, the prosecutor properly responded to defense counsel’s assertions regarding the witnesses’ motive to fabricate. *Ackerman, supra* at 452. We conclude that the prosecutor did not improperly vouch for the credibility of witnesses, and therefore, the prosecutor’s remarks did not constitute plain error.

Defendant also claims that the prosecutor improperly stated a personal belief in defendant’s guilt. To support his claim on appeal, defendant cites the prosecutor’s closing argument in which he stated, “He’s guilty of the murder.” The prosecutor’s theory of the case was that defendant fired the shots that killed the victim during a fight that occurred at Club 313. Defendant’s theory of the case was that he did not shoot the victim and was not even present at Club 313 on the night of the shooting. During his closing argument, defense counsel argued that credibility was at issue in this case. The prosecutor commented that the testimonial and physical evidence did not support defendant’s version of the events, and therefore, the jury should find defendant guilty. A prosecutor is permitted to argue that a defendant is not worthy of belief. See *Launsburry, supra* at 361. Moreover, a prosecutor may comment on the evidence or reasonable inferences drawn from the evidence to support his theory of the case and to refute a defendant’s position. See *Ackerman, supra* at 452-454. The prosecutor did not assert his personal belief that defendant was guilty. Instead, he based his statements regarding defendant’s guilt on the evidence or inferences drawn from the evidence and responded to defendant’s arguments and position that defendant was innocent. Therefore, we conclude that the prosecutor’s statements regarding defendant’s guilt were not improper and did not constitute plain error.

Moreover, the trial court instructed the jury that it was the jury’s function to determine the credibility of the witnesses and that the jury was not to consider counsels’ questions and statements as evidence. Because jurors are presumed to follow jury instructions, the instructions are generally presumed to cure most error. *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003). Thus, even if the prosecutor’s remarks were erroneous, the jury instruction

that the attorneys' arguments are not evidence would have cured any prejudicial effect. See *Bahoda, supra* at 281.

Similarly, we hold that defendant failed to prove his related claim that defense counsel's performance was ineffective for failing to object to the prosecutor's allegedly improper statements. Because we have determined that the prosecutor's closing and rebuttal arguments were not improper and did not constitute plain error, we also conclude that defense counsel's objection would have been futile. *Milstead, supra* at 401.

Affirmed.

/s/ Kirsten Frank Kelly

/s/ Hilda R. Gage

/s/ Brian K. Zahra